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6 **UNITED STATES DISTRICT COURT**
7 **WESTERN DISTRICT OF WASHINGTON**
8 **AT SEATTLE**

9 ELIJAH AGAPE CAIN,

10 Petitioner,

11 v.

12 UNITED STATES OF AMERICA,

13 Respondent.

14 NO. C11-537-MJP-JPD
15 (CR10-73-MJP)

16 REPORT AND
17 RECOMMENDATION

18 Petitioner Elijah Agape Cain moves via 28 U.S.C. § 2255 to vacate, set aside, or correct
19 the 120-month sentence imposed for his guilty-plea conviction on drug-conspiracy and firearm
20 counts. (Dkt. 1, at 1.)¹ Mr. Cain alleges (1) prosecutorial misconduct based on the charges
21 brought, the unreliability of confidential-informant statements, and the manner of collecting
22 incriminating testimony; and (2) ineffective assistance of counsel for failure to challenge the
23 conviction and sentence on the firearms count.² The Court recommends that Mr. Cain's
24 § 2255 motion be **DENIED** and this matter be **DISMISSED** with prejudice because he waived
25 his right to collaterally challenge his sentence, and he has failed to demonstrate ineffective
26 assistance of counsel. The Court also recommends **DENYING** the issuance of a certificate of

1 The Court refers to "Dkt." when citing the docket for the § 2255 motion, and to "CR Dkt." when citing
2 the docket for the underlying criminal matter CR10-73-MJP. Throughout this Report and Recommendation, the
3 Court refers to the pagination of the scanned originals as opposed to the page numbers supplied by the parties.

4 2 Although petitioner refers to three claims, his first two are actually a single claim of prosecutorial
5 misconduct. (Dkt. 1-1, at 1-3.)

1 appealability. An evidentiary hearing is not warranted because the record refutes Mr. Cain's
2 claims.

3 **I. BACKGROUND**

4 Pursuant to a Plea Agreement, Mr. Cain pleaded guilty to conspiracy to possess cocaine
5 with intent to distribute, 28 U.S.C. §§ 841(a)(1), 841(b)(1)(C), 846; and carrying a firearm
6 during and in relation to a drug-trafficking offense, 18 U.S.C. § 924(c). (CR Dkt. 40, at 1–3
7 (hereinafter "Plea Agreement").) The Plea Agreement contains an appeal waiver:

8 As part of this Plea Agreement, and on the condition that the Court imposes a
9 custodial sentence that is within or below the Sentencing Guidelines range (or
10 the statutory mandatory minimum, if greater than the Guidelines range) that is
determined by the Court at the time of sentencing, Defendant waives to the full
extent of the law:

11 a. any right conferred by Title 18, United States Codes, Section 3742 to
12 appeal the sentence, including any restitution order imposed; and

13 b. any right to bring a collateral attack against the conviction and
14 sentence, including any restitution order imposed, except as it may relate to the
effectiveness of legal representation.

15 (*Id.* at 8).

16 On July 1, 2010, the district court sentenced Mr. Cain to a total of 120 months of
17 imprisonment—60 months for each count, to be served consecutively. (CR Dkt. 68, at 2.) On
18 March 29, 2011, Mr. Cain timely filed the present 28 U.S.C. § 2255 motion. (Dkt. 1; CR Dkt.
19 70.) In June 2011, the Court denied petitioner's motion for default because it was in the
20 interest of justice to consider the government's Answer but ordered the government's counsel
21 to show cause why he should not be fined \$150 for filing his brief late and without an
22 explanation. (Dkt. 9.) Counsel responded that his brief was filed late due to inadvertence and
23 personal involvement in several, complicated prosecutions.³ (Dkt. 10.)

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25 ³ The government has not gained an unfair advantage from having filed late, and there is no indication
26 that counsel's representations are untrue. The Court therefore finds that the government's counsel has adequately
responded to the show-cause order, declines to impose a \$150 fine, and denies petitioner's renewed motion for
default. (See Dkt. 12, at 1.)

II. DISCUSSION

In the Plea Agreement, Mr. Cain waived his right to raise the arguments related to his prosecutorial-misconduct claim and, in any event, this claim lacks merit. Mr. Cain fails to demonstrate ineffective assistance of counsel because he can show neither deficient performance nor resulting prejudice.

A. Waiver of the Right To Collaterally Attack the Sentence

Under the rubric of prosecutorial misconduct, Mr. Cain contends that the prosecution trumped up the charges against him, used unreliable confidential-informant testimony, and used improperly obtained wiretap statements. This claim should be dismissed because Mr. Cain waived his right to collaterally attack his sentence.

Mr. Cain signed a Plea Agreement waiving his right to appeal or to collaterally attack his sentence. A defendant's waiver of the right to appeal or to collaterally attack his sentence is enforceable if "(1) the language of the waiver encompasses the defendant's right . . . on the grounds claimed . . . , and (2) the waiver is knowingly and voluntarily made." *United States v. Martinez*, 143 F.3d 1266, 1270-71 (9th Cir. 1998); *United States v. Abarca*, 985 F.2d 1012, 1014 (9th Cir. 1993). Mr. Cain's Plea Agreement contains a clear and unambiguous waiver of the right to appeal or to bring a collateral attack except as to the effectiveness of counsel. (Plea Agreement, at 8.) The waiver was conditioned on imposition of a sentence within or below the Sentencing Guidelines range, or the statutory mandatory minimum (if greater than the Guidelines range). (*Id.*) Mr. Cain received a total sentence of 120 months, i.e., exactly what the parties requested and more than 8 years below the low end of the Probation Office's calculation.⁴ Because Mr. Cain received a sentence below the Sentencing Guidelines range, the appeal/collateral attack waiver applies with full force.

⁴ The Probation Office calculated a range of 151 to 188 months before adding the 60-month mandatory minimum for the firearm charge, for a total of 211 to 248 months. (See CR Dkt. 56, at 3.) In the Plea Agreement, the parties stated that the appropriate sentence of imprisonment would have been within the range of 108 to 144 months. (Plea Agreement, at 5.)

1 Mr. Cain also knowingly and voluntarily consented to the Plea Agreement's express
2 terms. The Plea Agreement, which petitioner signed, provides that "Defendant agrees that
3 Defendant has entered into this Plea Agreement freely and voluntarily and that no threats or
4 promises, other than the promises contained in this Plea Agreement, were made to induce
5 Defendant to enter these pleas of guilty." (*Id.* at 8.) The undersigned magistrate judge
6 examined Mr. Cain under oath and determined that Mr. Cain had entered his guilty plea
7 knowingly, intelligently, and voluntarily. (CR Dkt. 41.) The Honorable Marsha J. Pechman
8 held a status conference at which she declined to accept the guilty plea until she could review
9 the Presentence Report and examine Mr. Cain again at sentencing about whether he entered the
10 Plea Agreement knowingly and voluntarily. (CR Dkt. 48.) At sentencing, Judge Pechman was
11 satisfied that Mr. Cain knew exactly what he was doing, informed him of the appeal rights not
12 waived, and noted that no objections regarding the knowing and voluntary nature of the guilty
13 plea were made. (CR Dkts. 66, 67.) Mr. Cain's claim of prosecutorial misconduct should be
14 dismissed because Mr. Cain unambiguously, knowingly, and voluntarily waived his right to
15 appeal or to bring a collateral attack on his sentence.⁵ *See United States v. Bolinger*, 940 F.2d
16 478, 480 (9th Cir. 1991).

17 Moreover, Mr. Cain's assertions regarding prosecutorial misconduct lack merit. First,
18 Mr. Cain admitted to facts that clearly support the drug-conspiracy and firearm charges such
19 that bringing these charges cannot be considered baseless or malicious. (Plea Agreement, at 5–
20 6.) Second, Mr. Cain's own attachments to his habeas petition show that the government relied
21 upon more than confidential informants in prosecuting him, and his factual admissions
22 demonstrate the verity rather than the unreliability of the statements from confidential
23 informants. (*Id.*; Dkt. 1, at 29–80.) Third, the prosecution cannot have violated the Federal
24 Wiretapping Act because those who spoke to Mr. Cain on the telephone consented to being

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⁵ Furthermore, it is clear that by asserting his prosecutorial-misconduct claim in the present collateral
26 attack, Mr. Cain has breached the Plea Agreement and the government may now, if it so chooses, withdraw from
the Plea Agreement and prosecute him for all offenses for which it has evidence. (Plea Agreement, at 7.)

1 recorded and authorities may intercept such communications “where . . . one of the parties to
2 the communication has given prior consent to such interception.” 18 U.S.C. § 2511(2)(c).

3 **B. Effective Assistance of Counsel**

4 Mr. Cain contends that he received ineffective assistance of counsel because counsel
5 should have objected to the 18 U.S.C. § 924(c) firearm charge and, subsequently, should have
6 objected to the use of 18 U.S.C. § 924(c) to “enhance” his sentence.⁶ Mr. Cain can show
7 neither deficient performance by counsel nor resulting prejudice.

8 First, defense counsel’s choice not to contest the firearm charge was not deficient
9 performance and was not prejudicial given substantiating evidence for Mr. Cain’s admission
10 that he was carrying a loaded, semiautomatic pistol, “ serial number TVH48320,” while he met
11 with co-conspirators about robbing a cocaine stash house. (Plea Agreement, at 6.) Second,
12 defense counsel’s choice not to challenge a § 924(c) sentencing “enhancement” could not have
13 been deficient performance or prejudicial because 18 U.S.C. § 924(c) is not a sentencing
14 enhancement. It is a second count of conviction that carries a five-year statutory minimum that
15 must run consecutively to other sentences. Third, as discussed earlier, the record shows that
16 Mr. Cain entered the Plea Agreement knowingly and voluntarily, and that the Plea Agreement
17 accurately set forth the factual and legal bases for charging him under 18 U.S.C. § 924(c).

18 **C. Certificate of Appealability**

19 If the district court adopts the Report and Recommendation to deny Mr. Cain’s § 2255
20 motion, it must determine whether a certificate of appealability (“COA”) should issue. Rule
21 11(a), Rules Governing Section 2255 Proceedings for the United States District Courts. A

22 ⁶ The Sixth Amendment guarantees a criminal defendant the right to effective assistance of counsel.
23 *Strickland v. Washington*, 466 U.S. 668, 687 (1984). Under the two-prong test set forth in *Strickland*, a defendant
24 must prove (1) that counsel’s performance fell below an objective standard of reasonableness and (2) that a
reasonable probability exists that, but for counsel’s error, the result of the proceedings would have been different.
Id. at 687–94. When considering the first prong of the *Strickland* test, judicial scrutiny must be highly deferential.
Id. at 689. There is a strong presumption that counsel’s performance fell within the wide range of reasonably
effective assistance. *Id.* The second prong of the *Strickland* test requires a showing of actual prejudice related to
counsel’s performance. The reviewing court need not address both components of the inquiry if an insufficient
showing is made on one component. *Strickland*, 466 U.S. at 697. Furthermore, if both components are to be
considered, there is no prescribed order in which to address them. *Id.*

1 COA may be issued only where a petitioner has made “a substantial showing of the denial of a
2 constitutional right.” *See* 28 U.S.C. § 2253(c)(3). A petitioner satisfies this standard “by
3 demonstrating that jurists of reason could disagree with the district court’s resolution of his
4 constitutional claims or that jurists could conclude the issues presented are adequate to deserve
5 encouragement to proceed further.” *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003). The
6 decision to issue a COA turns not on the court’s assessment of the applicant’s chances for
7 success on appeal, but whether the appeal would raise material and debatable questions. *See*
8 *id.* at 342.

The Court recommends that the issuance of a COA be denied because no jurist of reason could disagree with the Court’s conclusion that Mr. Cain waived his right to appeal or to collaterally challenge his sentence and that he was not deprived of his Sixth Amendment right to effective assistance of counsel. Mr. Cain should address whether a COA should be issued in his written objections, if any, to this Report and Recommendation.

III. CONCLUSION

15 The Court recommends that Mr. Cain's § 2255 motion be **DENIED** and **DISMISSED**
16 because he waived his right to collaterally challenge his sentence and he has failed to show
17 ineffective assistance of counsel. The Court finds that an evidentiary hearing is unnecessary
18 because his claims are refuted by the record. A proposed order accompanies this Report and
19 Recommendation.

DATED this 17th day of August, 2011.

James P. Donohue

JAMES P. DONOHUE
United States Magistrate Judge